

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOSEPH TELL	:	CIVIL ACTION
	:	
v.	:	
	:	
PHILA. DISTRICT ATTORNEY	:	NO. 14-02679

REPORT AND RECOMMENDATION

RICHARD A. LLORET
U.S. Magistrate Judge

July 25, 2014

On May 8, 2014, Joseph Tell filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241. Docket No. 1, “Petition.” In the petition he named the Philadelphia District Attorney as defendant. Petition, p. 1. Tell claims that the “prosecution has failed to bring my case to trial within 180 days.” Petition, ¶ 7(a). He also claims that “Pa C.S.A. states a criminal defendant must be brought to trial within 180 days of detention or if prosecution does not the charges must be withdrawn with predudice [sic].” *Id.* Tell alleges he was arrested September 8, 2013, and that as of the date of his petition (May 8, 2014) “over 240 days have elapsed.” Petition, ¶ 8. Petitioner asks for immediate release. Petition, ¶ 8. In response to a question about whether he had presented his claim to a state or federal court, Tell stated “I have filed 3 600 rule violation petitions with Criminal Justice Center 1301 Filbert Street Rm. 206. . .” Petition, p. 4.¹ The District Court referred this matter to me for a report and recommendation. Docket, No. 2.

¹ Tell does not actually allege a violation of a federal constitutional right in his petition. I will construe the petition liberally as an effort to allege a Sixth Amendment speedy trial claim. *See Rainey v. Varner*, 603 F.3d 189, 198 (3d Cir. 2010).

A review of Petitioner's state court docket² reveals that on several occasions Mr. Tell's attorney has requested continuances. Docket in *Commonwealth of Pennsylvania v. Joseph Tell*, No. CP-51-CR-0013637-2013, Court of Common Pleas of Philadelphia County ("CCP," a copy of which is attached as Exhibit "A"), pp. 4-6. The docket also reveals that Mr. Tell moved to have new counsel appointed, on March 17, 2014, and that Tell's new attorney entered an appearance on March 18, 2014. CCP, p. 6. A status listing was held on April 3, 2014, and a trial scheduled for May 11, 2014. CCP, p. 7. There is no indication from the docket that a trial took place. On and after the date of the last trial readiness conference, April 10, 2014, Mr. Tell filed a number of motions in the trial court that apparently remain unresolved. CCP, p. 7-8. Petitioner's case is still waiting for trial, and there has been no appeal.

Ordinarily a prisoner must present all of his claims to a state's intermediate appellate courts, as well as to its supreme court,³ before a district court may entertain a federal petition for habeas corpus, whether brought under 28 U.S.C. § 2254(b)(1)(A) or § 2241. *See Schandelmeier v. Cunningham*, 819 F.2d 52, 53 (3d Cir. 1986) ("The state court exhaustion requirement is mandated by statute under 28 U.S.C. § 2254(b) and has developed through decisional law . . . as to claims brought under 28 U.S.C. § 2241") (citations and internal quotations omitted); *Moore v. DeYoung*, 515 F.2d 437, 442 (3d Cir.1975) (no distinction between § 2254 and § 2241 "insofar as the exhaustion requirement is concerned"). The Third Circuit explained why:

² It is appropriate to take judicial notice of the state court records in Tell's case. *See Furnari v. Warden, Allenwood Fed. Corr. Inst.*, 218 F.3d 250, 255-56 (3d Cir. 2000); *U. S. ex rel. Geisler v. Walters*, 510 F.2d 887, 890 n.4 (3d Cir. 1975).

³ As a result of *In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, No. 218 Judicial Administration Docket No. 1 (Pa. May 9, 2000), Pennsylvania prisoners need not appeal to the Pennsylvania Supreme Court in order to exhaust their state remedies. *Lambert v. Blackwell*, 387 F.3d 210, 233 (3d Cir. 2004).

“[F]ederal habeas corpus does not lie, absent ‘special circumstances,’ to adjudicate the merits of an affirmative defense to a state criminal charge prior to a judgment of conviction by a state court.” *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 489 (1973). The rule is premised on the notion of comity, a principle of deference and “proper respect” for state governmental functions in our federal system. See *Younger v. Harris*, 401 U.S. 37, 44 (1971).

Evans v. Court of Common Pleas, Delaware Cnty., Pa., 959 F.2d 1227, 1234 (3d Cir. 1992). “The exhaustion requirement ensures that state courts have the first opportunity to review federal constitutional challenges to state convictions and preserves the role of state courts in protecting federally guaranteed rights.” *Caswell v. Ryan*, 953 F.2d 853, 857 (3d Cir. 1992).

The exhaustion requirement is satisfied if a claim is “fairly presented” to the state courts. *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (quoting *Picard v. Connor*, 404 U.S. 270, 275 (1971)). A claim is “fairly presented” when “both the legal theory and the facts supporting a federal claim . . . have been submitted to the state courts.” *Lesko v. Owens*, 881 F.2d 44, 50 (3d Cir.1989) (citations omitted).

While federal courts have jurisdiction to issue a habeas writ before a judgment issues in a state criminal proceeding, “jurisdiction without exhaustion should not be exercised at the pre-trial stage unless extraordinary circumstances are present.” *Moore*, 515 F.2d at 441-43 (citations omitted). A petitioner must allege “delay, harassment, bad faith or other intentional activity” in order to establish the “extraordinary circumstances” that would justify pre-exhaustion federal habeas relief. *Lambert v. Blackwell*, 134 F.3d 506, 517 (3d Cir.1997) (quoting *Moore*, 515 F.2d at 447 n. 12).

In *Moore* the Court of Appeals held that a state prisoner had failed to establish “extraordinary circumstances,” despite the Court’s “distress with the manner in which a state law enforcement office has conducted the proceedings[.]” 515 F.2d at 439. *Moore*, a

state prisoner, had been “exposed to state court trial in New Jersey since 1967.” *Id.* In 1973 Moore filed a federal habeas action seeking the dismissal of his state case on speedy trial grounds. *Id.* The Court distinguished *Braden*, in which the Supreme Court had permitted a pre-trial habeas petition based on an alleged speedy trial violation. 515 F.2d at 444, 446. In *Braden*, unlike *Moore*, petitioner had exhausted his state remedies, and in *Braden* the petitioner sought to force the Commonwealth to bring him to trial, rather than to have his case dismissed. 515 F.2d at 444, 446.

The delay in Tell’s case is perfectly ordinary. At least some of it was occasioned by relief sought by Tell or his attorney. The delay is nowhere near as lengthy as the delay considered in *Moore*, where the Court denied a writ. Tell’s case is “precisely the situation anticipated by the Supreme Court’s caveat that federal courts should not permit the claimed denial of a speedy trial, presented in a pre-trial application for habeas, to result in the ‘derailment of a pending state proceeding.’” 515 F.2d at 445-46 (citing to *Braden*, 410 U.S. at 493).

By order dated July 7, 2014, I required the parties to state a basis for objecting to dismissal of the petition without prejudice by July 21, 2014. Docket, No. 3. No objection has been filed. Petitioner has not exhausted his state remedies, nor do the allegations of his petition establish the “extraordinary circumstances” necessary to avoid the exhaustion requirement.

Accordingly, I make the following:

R E C O M M E N D A T I O N

AND NOW, this 25th day of July, 2014, it is respectfully recommended that

Joseph Tell's petition for habeas corpus be DISMISSED, without prejudice.

BY THE COURT:

s/Richard A. Lloret _____
RICHARD A. LLORET
U.S. MAGISTRATE JUDGE

EXHIBIT A

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

DOCKET



Docket Number: CP-51-CR-0013637-2013

CRIMINAL DOCKET

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CASE INFORMATION

Judge Assigned: Bright, Gwendolyn N.

Date Filed: 11/01/2013

Initiation Date: 11/01/2013

OTN: N 880002-4

LOTN:

Originating Docket No: MC-51-CR-0035133-2013

Initial Issuing Authority: Wendy L. Pew

Final Issuing Authority:

Arresting Agency: Philadelphia Pd

Arresting Officer: Campbell, Joseph G.

Complaint/Incident #: 1315086150-0035133

Case Local Number Type(s)

Case Local Number(s)

Originating Docket Number

MC-51-CR-0035133-2013

District Control Number

1315086150

Originating Document Number

1315086150-0035133

STATUS INFORMATION

Case Status:	Active	Status Date	Processing Status	Arrest Date:	09/09/2013
		04/03/2014	Awaiting Trial Readiness Conference		
		04/03/2014	Awaiting Trial		
		11/21/2013	Awaiting Pre-Trial Conference		
		11/08/2013	Awaiting Formal Arraignment		
		11/01/2013	Awaiting Filing of Information		

CALENDAR EVENTS

Case Calendar	Schedule	Start	Room	Judge Name	Schedule
Event Type	Start Date	Time			Status
Formal Arraignment	11/21/2013	11:00 am	1104		Scheduled
Pre-Trial	12/10/2013	9:00 am	1005	Judge Donna Woelpper	Scheduled
Conference					
Pretrial Bring Back	12/17/2013	9:00 am	1005	Judge Donna Woelpper	Continued
Pretrial Bring Back	01/14/2014	9:00 am	1005	Judge Donna Woelpper	Scheduled
Scheduling	02/03/2014	9:00 am	1102	Judge Gwendolyn N. Bright	Continued
Conference					
Scheduling	02/12/2014	9:00 am	1102	Judge Gwendolyn N. Bright	Continued
Conference					
Scheduling	02/25/2014	9:00 am	1102	Judge Gwendolyn N. Bright	Continued
Conference					
Scheduling	03/17/2014	9:00 am	1102	Judge Gwendolyn N. Bright	Scheduled
Conference					
Status Listing	04/03/2014	9:00 am	1102	Judge Gwendolyn N. Bright	Scheduled
Trial Readiness	04/10/2015	9:00 am	1102	Judge Gwendolyn N. Bright	Scheduled
Conference					
Trial	05/11/2015	9:00 am	1102	Judge Gwendolyn N. Bright	Scheduled

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CONFINEMENT INFORMATION

<u>Confinement Known As Of</u>	<u>Confinement Type</u>	<u>Destination Location</u>	<u>Confinement Reason</u>	<u>Still in Custody</u>
09/09/2013	County Jail	Curran-Fromhold Corr. Fac.		Yes

DEFENDANT INFORMATION

Date Of Birth: 10/05/1958 City/State/Zip: Philadelphia, PA 19135

CASE PARTICIPANTS

<u>Participant Type</u>	<u>Name</u>
Defendant	Tell, Joseph

BAIL INFORMATION

Tell, Joseph

Nebbia Status: None

<u>Bail Action</u>	<u>Date</u>	<u>Bail Type</u>	<u>Percentage</u>	<u>Amount</u>	<u>Bail Posting Status</u>	<u>Posting Date</u>
Set	09/09/2013	Monetary	10.00%	\$700,000.00		
Decrease Bail Amount	10/10/2013	Monetary	10.00%	\$100,000.00		

CHARGES

<u>Seq.</u>	<u>Orig Seq.</u>	<u>Grade</u>	<u>Statute</u>	<u>Statute Description</u>	<u>Offense Dt.</u>	<u>OTN</u>
1	1		18 § 3123	IDSI Forcible Compulsion	09/08/2013	N 880002-4
2	2		18 § 3124.1	Sexual Assault	09/08/2013	N 880002-4
3	3		18 § 2902	Unlawful Restraint/ Serious Bodily Injury	09/08/2013	N 880002-4
4	4		18 § 3126	Indecent Assault Forcible Compulsion	09/08/2013	N 880002-4
5	5		18 § 3127	Indecent Exposure	09/08/2013	N 880002-4
6	6		18 § 2903	False Imprisonment	09/08/2013	N 880002-4

DISPOSITION SENTENCING/PENALTIES

Disposition

<u>Case Event</u>	<u>Disposition Date</u>	<u>Final Disposition</u>
<u>Sequence/Description</u>	<u>Offense Disposition</u>	<u>Grade</u> <u>Section</u>
<u>Sentencing Judge</u>	<u>Sentence Date</u>	<u>Credit For Time Served</u>
<u>Sentence/Diversion Program Type</u>	<u>Incarceration/Diversionary Period</u>	<u>Start Date</u>
<u>Sentence Conditions</u>		

Lower Court Proceeding (generic)

	<u>Disposition Date</u>	<u>Final Disposition</u>
Preliminary Hearing	10/31/2013	Not Final
1 / IDSI Forcible Compulsion	Held for Court	18 § 3123 §§ A1
2 / Sexual Assault	Held for Court	18 § 3124.1
3 / Unlawful Restraint/ Serious Bodily Injury	Held for Court	18 § 2902 §§ A1
4 / Indecent Assault Forcible Compulsion	Held for Court	18 § 3126 §§ A2
5 / Indecent Exposure	Held for Court	18 § 3127 §§ A

CPCMS 9082

Printed: 07/24/2014

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DISPOSITION SENTENCING/PENALTIES

Disposition

<u>Case Event</u>	<u>Disposition Date</u>	<u>Final Disposition</u>
<u>Sequence/Description</u>	<u>Offense Disposition</u>	<u>Grade</u> <u>Section</u>
<u>Sentencing Judge</u>	<u>Sentence Date</u>	<u>Credit For Time Served</u>
<u>Sentence/Diversion Program Type</u>	<u>Incarceration/Diversionary Period</u>	<u>Start Date</u>
<u>Sentence Conditions</u>		
6 / False Imprisonment	Held for Court	18 § 2903 §§ A
Proceed to Court Defendant Was Not Present		
Information Filed	11/08/2013	Not Final
1 / IDSI Forcible Compulsion	Held for Court	18 § 3123 §§ A1
2 / Sexual Assault	Held for Court	18 § 3124.1
3 / Unlawful Restraint/ Serious Bodily Injury	Held for Court	18 § 2902 §§ A1
4 / Indecent Assault Forcible Compulsion	Held for Court	18 § 3126 §§ A2
5 / Indecent Exposure	Held for Court	18 § 3127 §§ A
6 / False Imprisonment	Held for Court	18 § 2903 §§ A

COMMONWEALTH INFORMATION

Name: Philadelphia County District Attorney's
Office
Prosecutor

Supreme Court No:

Phone Number(s):
215-686-8000 (Phone)

Address:
3 South Penn Square
Philadelphia, PA 19107

ATTORNEY INFORMATION

Name: Darryl A. Irwin
Court Appointed

Supreme Court No: 018413Rep. Status: Active

Phone Number(s):
215-222-0651 (Phone)
215-222-0653 (Fax)

Address:
315 N 37TH St
Philadelphia, PA 19104-2359

Representing: Tell, Joseph

ENTRIES

<u>Sequence Number</u>	<u>CP Filed Date</u>	<u>Document Date</u>	<u>Filed By</u>
1	11/01/2013		Court of Common Pleas - Philadelphia County
		Held for Court	
1	11/08/2013		Commonwealth of Pennsylvania
		Information Filed	

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<u>Sequence Number</u>	<u>CP Filed Date</u>	<u>Document Date</u>	<u>Filed By</u>
5	11/21/2013		Court of Common Pleas - Philadelphia County
Hearing Notice			
1	12/10/2013		Woelpper, Donna
Motion for Continuance			
Defense request , counsel unavailable. . Time ruled excludable.			
Ncd :12/17/13 rm 1005			
custody			
Judge Donna Woelpper, ADA: B Daisey, D atty D Rudenstein DRT: W Evans, Clerk: L Gordon			
1	12/17/2013		Woelpper, Donna
Order Granting Motion for Continuance			
PRE-TRIAL CONFERENCE HELD			
DISCOVERY COMPLETE.			
DEFENSE REQUEST TO CONVEY OFFER			
NEXT COURT DATE: 1/14/14 ROOM: 1005			
DATE IS EARLIEST POSSIBLE DATE CONSISTENT WITH ALL COUNSEL AND COURT CALENDAR			
DEFENDANT IN CUSTODY (CFCF)			
HONORABLE: DONNA WOELPPER			
ADA: JOHN MORGAN PD: LINDA KING/MARGARET FUNK			
DRT: TABITHA ABNEY CLERK: KIM FORD			
1	12/31/2013		Tell, Joseph
Motion for Modification of Bail			
1	01/07/2014		Tell, Joseph
Motion for Suppression			
2	01/07/2014		Tell, Joseph
Motion to Quash			
1	01/08/2014		Tell, Joseph
Defense Request - Jury Trial			
2	01/08/2014		Tell, Joseph
Motion to Set Nominal Bail			

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Sequence Number	CP Filed Date	Document Date	Filed By
3	01/08/2014		Tell, Joseph
Motion to Dismiss Pursuant to Rule 600			
3	01/14/2014		Woelpper, Donna
Pre-Trial Conference Held			
Commonwealth offer rejected by defendant. Signed offer sheet to be provided prior to next court date. List for trial.			
Scheduling conference on			
NCD: 2/3/14 rm 1102			
custody			
Date given is earliest possible date			
Judge Donna Woelpper, ADA: J Morgan, D atty D Rudenstein, DRT: R Sturdivant, Clerk: L Gordon			
1	01/23/2014		Tell, Joseph
Motion to Compel			
1	01/29/2014		Tell, Joseph
Motion to Quash			
4	02/03/2014		Bright, Gwendolyn N.
Order Granting Motion for Continuance			
Scheduling Conference Continued-Defense Request. Time Ruled Excludable. NCD: 2-12-14 Rm. 1102			
Judge: G. Bright/ ADA: NA/ Atty. : D. Rudenstein/ Steno: S. Jackson/ Ct. Clerk: J. King			
4	02/12/2014		Tell, Joseph
Petition for Writ of Habeas Corpus Filed			
5	02/12/2014		Tell, Joseph
Motion to Quash			
6	02/12/2014		Bright, Gwendolyn N.
Order Granting Motion for Continuance			
Scheduling Conference Continued-Defense Request. NCD: 2-25-14 Rm. 1102			
Judge: G. Bright/ ADA: NA/ Atty. : D. Rudenstein/ Steno: S. Jackson/ Ct. Clerk: J. King			
1	02/24/2014		Tell, Joseph
Motion to Dismiss Pursuant to Rule 600			
2	02/24/2014		Tell, Joseph
Motion to Suppress Statements			

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Sequence Number	CP Filed Date	Document Date	Filed By
4	02/25/2014		Bright, Gwendolyn N.
Order Granting Motion for Continuance			
Scheduling Conference Continued. Defense Request. List For Status Of Counsel. Time Ruled Excludable. NCD: 3-17-14 Rm. 1102			
Judge: G. Bright/ ADA: B. Jaycox/ Atty. : D. Rudenstein/ Steno: S. Jackson/ Ct. Clerk: J. King			
1	02/26/2014		Tell, Joseph
Motion to Quash Return of Transcript and Original Papers			
2	02/26/2014		Tell, Joseph
Motion to Suppress Evidence			
1	03/05/2014		Tell, Joseph
Motion for Appointment of Public Defender			
1	03/07/2014		Tell, Joseph
Motion to Quash			
2	03/07/2014		Tell, Joseph
Motion to Set Nominal Bail			
3	03/07/2014		Tell, Joseph
Motion to Subpoena Witness			
1	03/10/2014		Tell, Joseph
Motion for Modification of Bail			
1	03/14/2014		Tell, Joseph
Motion for Sanctions			
2	03/17/2014		Bright, Gwendolyn N.
Order Granting Motion for Continuance			
Scheduling Conference Continued-Defense Request. Defense Counsel Motion To Withdraw And Defendant' s Motion To Have New Counsel Appointed Granted. List For Status Of Counsel. Time Ruled Excludable From 3-17-14 To 4-3-14. NCD: 4-3-14 Rm. 1102			
Judge: G. Bright/ ADA: M. Goddard For B. Jaycox/ Atty. : D. Rudenstein/ Steno: L. Postiglione/ Ct. Clerk: J. King			
1	03/18/2014		Irwin, Darryl A.
Entry of Appearance			

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ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
1	03/27/2014		Tell, Joseph
Defense Request for Subpeona Duces Tecum			
1	04/03/2014		Bright, Gwendolyn N.
Counsel Attached for Trial			
The Court orders ADA Brandon Jaycox and Defense Counsel Darryl A. Irwin attached for a 3 day Jury Trial on 5/11/2014 in Courtroom 1102 and a Status Hearing on 4/10/2015 in Courtroom 1102			
2	04/03/2014		Bright, Gwendolyn N.
Counsel Attached for Trial			
The Court orders ADA Brandon Jaycos and Defense Counsel Darryl A. Irwin attached for a 3 day Jury Trial on 5/11/2015 in Courtroom 1102			
5	04/03/2014		Court of Common Pleas - Philadelphia County
Hearing Notice			
7	04/03/2014		Court of Common Pleas - Philadelphia County
Hearing Notice			
8	04/03/2014		Bright, Gwendolyn N.
Status Listing			
Discovery Complete. List For Status. Three Day Jury Trial To Be Listed For 5-11-15. Both Counsel Attached For Both Dates. Time Ruled Excludable. NCD: 4-10-15 Rm. 1102			
Judge: G. Bright/ ADA: B. Jaycox/ Atty. : D. Irwin/ Steno: L. Coffman/ Ct. Clerk: J. King			
1	04/09/2014		Bright, Gwendolyn N.
Corrective Docket Entry			
Docket Entry Of 4-3-14 Is Corrected To Note That The Next Court Date Is 4-10-15 Not 4-10-14.			
Judge: G. Bright/ ADA: B. Jaycox/ Atty. : D. Irwin/ Steno: L. Coffman/ Ct. Clerk: J. King			
1	04/10/2014		Tell, Joseph
Motion to Dismiss			
1	05/02/2014		Tell, Joseph
Motion for Sanctions			
1	05/12/2014		Tell, Joseph
Motion for Modification of Bail			

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<u>Sequence Number</u>	<u>CP Filed Date</u>	<u>Document Date</u>	<u>Filed By</u>
1	05/13/2014		Tell, Joseph
Motion for Sanctions			
1	06/06/2014		Tell, Joseph
Motion to Set Nominal Bail			
1	06/10/2014		Tell, Joseph
Motion to Dismiss			
2	06/10/2014		Tell, Joseph
Motion to Quash Return of Transcript and Original Papers			
1	06/18/2014		Tell, Joseph
Motion to Proceed Pro Se			
2	06/18/2014		Tell, Joseph
Motion and Demand for Speedy Trial			
1	06/19/2014		Tell, Joseph
Request For Subpoena			
1	06/24/2014		Tell, Joseph
Motion to Dismiss Pursuant to Rule 600			
1	07/17/2014		Tell, Joseph
Pro Se Correspondence			

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CASE FINANCIAL INFORMATION

Last Payment Date:

Total of Last Payment:

Tell, Joseph
DefendantAssessmentPaymentsAdjustmentsNon Monetary
PaymentsTotal**Costs/Fees**

Motion Filing Fee (Philadelphia)

\$12.50

\$0.00

\$0.00

\$0.00

\$12.50

Motion Filing Fee (Philadelphia)

\$12.50

\$0.00

\$0.00

\$0.00

\$12.50

Costs/Fees Totals:

\$25.00

\$0.00

\$0.00

\$0.00

\$25.00

Grand Totals:

\$25.00

\$0.00

\$0.00

\$0.00

\$25.00

** - Indicates assessment is subrogated